IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY VALESTINE MILLER TURNER	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA OFFICE OF THE CONTROLLER	:	NO. 96-8570

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J. December 30, 1997

Presently before the Court is the Defendant's Motion for Summary Judgment (Docket No. 8). For the reasons stated below, the defendant's Motion is **GRANTED**.

I. BACKGROUND

Taken in the light most favorable to the non-moving party, the facts are as follows. The Philadelphia Rule Home Charter (the "Charter") "establish[es] for the City [of Philadelphia] a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, demotion, transfer, lay-off, removal and discipline of its employees." 351 Pa. Code § 7.7-300 (1996). Further, the Charter requires that "[a]ll appointments and promotions to positions in the civil service shall be made in accordance with the civil service regulations." Id.

Moreover, the Charter requires that the civil service regulations provide for "[o]pen competitive examinations to test

the relative fitness of applicants for the respective positions." Id. § 7.7-401(c). Once an applicant passes the test required for consideration, he or she is placed on "eligible lists for appointment and promotion, . . . in the order of [his or her] relative excellence in the respective examinations." Id. § 7.7-401(f). The Charter states that the civil service regulations (the "regulations") shall provide for "the certification of the two persons standing highest on the appropriate list to fill a vacancy." Id. § 7.7-401(h). However, once a candidate "has been rejected twice by an appointing authority in favor of others on the same eligible list, such name shall not again be certified to that appointing authority." Id.

Accordingly, the Civil Service Commission has enacted regulations satisfying the Charter's mandate. The regulations state that where an appointing authority requests a candidate to fill a vacancy, "the two persons [on the eligible list] who are highest in rank" are sent to the appointing authority for consideration for the vacant position. Pa. Civil Serv. Reg. 11.03. Where there is more than one vacancy, the appointing authority is sent "the largest number of names that could be certified to fill such vacancies had separate requisition been made in the case of each vacancy." Pa. Civil Serv. Reg. 11.04. Then, the candidates are appointed as if the appointing authority had made a separate requisition for each available position. Id.

When "an eligible [candidate]. . . has been rejected twice by an appointing authority in favor of others on the same eligible list [the candidate] shall not again be certified to that appointing authority." Pa. Civil Serv. Reg. 11.05.

On September 28, 1994, the plaintiff, Mary Valestine Miller-Turner, took the written civil service examination required for consideration for employment as an Auditor Trainee with the defendant, the City of Philadelphia's Office of the Controller. Def.'s Mot. Exs. H & M. Although the plaintiff had failed the exam on a prior occasion, she successfully passed the qualifying test on her second attempt. Def.'s Mot. for Summ. J. Ex. H. The plaintiff received the minimum passing score. Id.

In late October or early November of 1995, the City of Philadelphia's Personnel Department certified six applicants to the defendant for consideration for four Auditor Trainee vacancies. Scaperotto Aff. ¶ 8. The six applicants were: 1) the plaintiff; 2) Eugene McQuary III; 3) Josefine Arevalo; 4) William Rempfer; 5) Mark Allen, and 6) Timothy Carfrey. Id. ¶ 11. Of the six candidates, the plaintiff had the lowest qualifying exam score; thus, she was ranked last. Def.'s Ex. H. Three of the defendant's employees, Albert F. Scaperotto ("Scaperotto"), Marian Tkaczuk ("Tkaczuk"), and Fred Wise ("Wise"), interviewed all of the applicants, with the exception of Timothy Carfrey (who was not available to be interviewed). Scaperotto Aff. ¶ 11.

The plaintiff was first paired against Josefine Arevalo ("Arevalo"), a woman who was the highest ranked applicant.[1] Scaperotto, Tkaczuk, and Wise unanimously chose Arevalo over the plaintiff. Id. ¶ 20; Tkaczuk Aff. ¶ 16; Wise Aff. ¶ 16. As a result, the plaintiff was rejected by the "appointing authority" for the first time.

Next, the plaintiff was paired with the second highest applicant, William Rempfer ("Rempfer"), who is a male Caucasian. Scaperotto Aff. ¶ 17. Scaperotto, Tkaczuk, and Wise unanimously chose Rempfer over the plaintiff. Id. ¶ 20; Tkaczuk Aff. ¶ 16; Wise Aff. ¶ 16. As a result, the plaintiff was rejected by the "appointing authority" for the second time. According to the Charter and the regulations, the plaintiff was not considered for the remaining vacant Auditor Trainee positions. Scaperotto Aff. ¶ 19.

On December 23, 1996, the plaintiff initiated this suit against the defendant, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, with respect to her non-selection for employment. In Count I, the plaintiff alleged that she was not selected and was removed from further consideration for employment based on racial or gender discrimination. Pl.'s Compl. ¶ 18. In Count II, the plaintiff seemed to allege that

1. Eugene McQuary III was originally the highest ranked applicant, but, because he had not yet received his bachelor's degree, he was not considered for the position. Def.'s Mot. for Summ. J. Ex. H.

she was discriminated on the basis of her age.[2] Pl.'s Compl. ¶ 21. On October 3, 1997, the defendant filed the instant motion.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a

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2. Plaintiff's complaint reads in relevant part: "Ms. Turner is a forty three old [sic] female. Title VII protects individuals from discrimination based on their age." Pl.'s Compl. ¶¶ 20, 21.

The plaintiff's complaint is problematic for two reasons. First, the plaintiff never alleges that she is the victim of age discrimination. She merely states that Title VII proscribes such conduct. However, this Court assumes that it was her intent to allege that she was the victim of age discrimination.

Second, Title VII does not prohibit age discrimination. See 42 U.S.C. § 2000e-2. Instead, Section 623(a)(1) of Title 29 of the United States Code proscribes age discrimination in the employment context. Thus, this Court will consider the plaintiff's claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (the "ADEA").

reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Race, Gender and Age Discrimination: The ADEA and Title VII

In Count I of her complaint, the plaintiff alleges that her non-selection for the position of Auditor Trainee and subsequent withdrawal from consideration was the result of race or gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. In Count II, she claims that she was a victim of age discrimination, pursuant to the ADEA, 29 U.S.C. § 621 et seq.

Race and gender discrimination claims brought under Title VII, as well as age discrimination claims brought under the ADEA, are treated "under the shifting-burden analysis of

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)." Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994).[3] In a case of failure to hire under either Title VII or the ADEA, the legal analysis proceeds in three parts. First, the plaintiff carries the burden of establishing a prima facie case of unlawful discrimination by showing that: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications, the plaintiff was rejected; and (4) the circumstances of the plaintiff's rejection give rise to an inference of unlawful discrimination. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp., 411 U.S. at 802.[4]

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3. The plaintiff has not offered any direct evidence of discrimination. Accordingly, the Court must apply the shifting-burden analysis.

4. The fourth prong of the prima facie case is derived from the Supreme Court's decision in Burdine, 450 U.S. at 253. Traditionally, this fourth prong has been formulated as: "after [the] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas, 411 U.S. at 802. This formulation, however, does not work well when the employer's hiring decisions are made, as in this case, from a pool of applicants, instead of from applicants considered sequentially. Lex K. Larson, Employment Discrimination § 8.02[6], at 8-46 (2d ed. 1995). "Because in a pool the selection of someone else is simultaneous with the rejection of the plaintiff, the plaintiff obviously cannot show that the position 'remained open' or that the employer has 'continued to seek applicants with the plaintiff's qualifications.'" Id. In McDonnell Douglas, the Supreme Court recognized that the standard for a prima facie case cannot be inflexible because the "facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." McDonnell Douglas, 411 U.S. at 802 n.13. The same flexibility applies in ADEA cases. Torre, 42 F.3d at 830-31. In light of the Supreme Court's and the Third Circuit's recognition that the prima facie case standard may be flexible, this Court believes that the Burdine formulation is more appropriate in this circumstance than the traditional McDonnell Douglas formulation.

Second, if the plaintiff succeeds in establishing a prima facie case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802; Torre, 42 F.3d at 829. Finally, if the defendant articulates a legitimate reason, the burden rebounds to the plaintiff to show that the reason is a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-08 (1993); Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The Third Circuit has stated that to defeat a motion for summary judgment, once the defendant meets its burden of articulating a nondiscriminatory reason, the plaintiff must: (1) discredit the proffered reason, either circumstantially or directly, or (2) adduce evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. Torre, 42 F.3d at 829; Fuentes, 32 F.3d at 764. The Third Circuit has warned, however, that:

> [T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find

> them "unworthy of credence," and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons."

Fuentes, 32 F.2d at 765 (citations omitted) (emphasis and second alteration in original).

1. Prima Facie Case of Gender Discrimination

The defendant concedes the plaintiff satisfies the first three prongs of her prima facie case on both Counts--that the plaintiff belongs to a protected class (she is a forty-three year old black woman), that the plaintiff applied for and was qualified for a job for which the employer was seeking applicants, and that, despite her qualifications, the plaintiff was rejected. Torre, 42 F.3d at 830-31. The defendant argues, however, that the plaintiff fails to satisfy the fourth prong, in regard to her Title VII gender discrimination claim, because the person who was ultimately selected was a woman.

While the defendant claims that a woman was eventually chosen for the position, Rempfer, a male, was also selected instead of the plaintiff. Thus, the plaintiff was rejected in favor of a male applicant. Moreover, when Rempfer was selected over the plaintiff, the plaintiff was removed from further consideration. Accordingly, the plaintiff has sufficiently established a prima facie case of gender discrimination.

2. Discrediting Defendant's Proffered Reasons

Although the plaintiff may have established a prima facie case of gender, race, and age discrimination, the plaintiff has not successfully discredited the defendant's proffered, nondiscriminatory reason for not selecting the plaintiff: that the selected applicants were better qualified than the plaintiff.[5] The selecting personnel claim that they preferred Arevalo and Rempfer because: (1) their college grade point averages were better than the plaintiff's average; (2) their employment history was significantly better than the plaintiff's; and (3) their civil service test scores were better than the plaintiff's scores. Tkaczuk Aff. ¶ 18; Wise Aff. ¶ 18; Scaperotto Aff. ¶ 22. Moreover, the defendant has offered selected provisions of the Charter and the regulations to explain why the plaintiff's name was removed from the eligibles list after she was denied employment.

The plaintiff has attempted to discredit the defendant's reasons by arguing that: (1) the plaintiff's grade point average in accounting is one tenth of a point greater than Rempfer's; (2) the defendant improperly considered the plaintiff's termination from a previous job, because that job was not in the field of accounting; and (3) every other candidate was offered a position by the defendant. The plaintiff has not

5. The defendant has offered the affidavits of Scaperotto, Tkaczuk, and Wise, the selecting officials who interviewed the plaintiff, in support of its reasons for not selecting the plaintiff. Def.'s Mot. for Summ. J. Exs. F, O, and P.

offered any evidence to show that the defendant's reliance on the Charter and the regulations was improper.

For the reasons that follow, the Court finds that plaintiff has not satisfied her burden of discrediting the defendant's proffered reasons. First, the Court finds that the defendant's consideration of the candidates' overall academic record is an acceptable, non-discriminatory basis on which to rely when making selection decisions. The fact that the defendant chose an applicant with a one-tenth lower grade point average in accounting, but with a better overall average, is insignificant. The selection was based on overall academic performance, not on gender, age, or race. Scaperotto Aff. ¶ 22; Tkaczuk Aff. ¶ 18; Wise Aff. ¶ 18. Thus, the plaintiff has failed to show that the defendant's first proffered reason is false or "that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Torre, 42 F.3d at 839 (quoting Fuentes, 32 F.3d at 764).

Second, the plaintiff's argument that the defendant should not have considered the plaintiff's termination from a previous job is meritless. The selecting employees found that Arevalo's and Rempfer's overall employment history was better than the plaintiff's because: (1) Arevalo had worked for First Fidelity Bank for approximately seven years prior to interviewing

with the defendant, during which time Arevalo had been promoted from Accounting Assistant to Staff Accountant to Senior Accountant, Def.'s Mot. for Summ. J. Ex. J; (2) Rempfer had worked as an accountant for the First Judicial District of Pennsylvania, Court of Common Pleas, for approximately five years prior to interviewing with the defendant, id.; and (3) neither Arevalo nor Rempfer had ever been fired from any employment. Id.

In comparison, the plaintiff held a variety of jobs during the previous eight years, was currently working as a substitute teacher for the School District of Philadelphia, and had been fired from a previous employer. Def.'s Mot. for Summ. J. Ex. K. Moreover, Scaperotto, Tkaczuk, and Wise state that "the plaintiff did not provide a clear explanation as to why she had been dismissed." Scaperotto Aff. ¶ 22; Tkaczuk Aff. ¶ 18; Wise Aff. ¶ 18. Obviously, Rempfer and Arevalo were more qualified and more reliable candidates than the plaintiff, based on their recent employment experiences. Accordingly, the plaintiff has failed to show that the defendant's second proffered reason is false or "that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Torre, 42 F.3d at 839 (quoting Fuentes, 32 F.3d at 764).

Third, the defendant claims that "the respective applicant's civil service test scores also played a part in the

Defendant's decision." Def.'s Mot. for Summ. J. at 13; Scaperotto Aff. ¶ 22; Tkaczuk Aff. ¶ 18; Wise Aff. ¶ 18. While Arevalo scored an 81.00 and Rempfer scored a 77.00, the plaintiff barely passed the exam with a minimum score of 70.00. Def.'s Mot. for Summ. J. Ex. H. The selecting personnel have all stated that they considered these scores when making their decisions. Tkaczuk Aff. ¶ 18; Wise Aff. ¶ 18; Scaperotto Aff. ¶ 22. The plaintiff has failed to offer any evidence to show that the defendant's third proffered reason is false or "that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Torre, 42 F.3d at 839 (quoting Fuentes, 32 F.3d at 764).

Fourth, as explained above, the Charter and the regulations govern the methods of appointment of City of Philadelphia employees. 351 Pa. Code § 7.7-300. Once an applicant passes the test required for consideration, he or she is placed on "eligible lists for appointment and promotion, . . . in the order of [his or her] relative excellence in the respective examinations." Id. § 7.7-401(f). Where an appointing authority requests a candidate to fill a vacancy, "the two persons [on the eligible lists] who are highest in rank" are sent to the appointing authority to interview for the position. Pa. Civil Serv. Reg. 11.03. Where there is more than one vacancy, the appointing authority is sent "the largest number of names

that could be certified to fill such vacancies had separate requisition been made in the case of each vacancy." Pa. Civil Serv. Reg. 11.04. Then, the candidates are appointed as if the appointing authority had made a separate requisition for each available position. Id. When "an eligible [applicant]. . . has been rejected twice by an appointing authority in favor of others on the same eligible list [the candidate] shall not again be certified to that appointing authority." Pa. Civil Serv. Reg. 11.05; 351 Pa. Code § 7.7-401(f).

The defendant argues that its employees merely followed this statutory and regulatory framework. The plaintiff's name was added to the eligibles list, and she was interviewed for a position when the vacancies arose with the defendant. However, the defendant was rejected twice by the defendant: first when the plaintiff was paired with Arevalo and second when she was paired with Rempfer. Thus, the plaintiff was prohibited from being "certified to that appointing authority." Pa. Civil Serv. Reg. 11.05; 351 Pa. Code § 7.7-401(f). Accordingly, the plaintiff's name was removed from the list. The plaintiff fails to offer any evidence to show that the defendant's justification for removing the plaintiff from consideration is false or "that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Torre, 42 F.3d at 839 (quoting Fuentes, 32 F.3d at 764).

Finally, even assuming that the defendant's selection methods were somehow improper, the plaintiff has demonstrated, at most, that the employer's decision may not have been "wise, shrewd, prudent, or competent." Fuentes, 32 F.2d at 765. Given the fact that a forty year old black female was eventually selected for the position, however, the plaintiff has not demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'" Id. (emphasis and alteration in original); Scaperotto Aff. ¶ 28.

III. CONCLUSION

For the foregoing reasons, the plaintiff has not successfully discredited the defendant's proffered reasons. Thus, the defendant's Motion for Summary Judgment is granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY VALESTINE MILLER TURNER	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA OFFICE	:	
OF THE CONTROLLER	:	NO. 96-8570

FINAL JUDGMENT

AND NOW, this 30th day of December, 1997, upon consideration of Defendant's Motion for Summary Judgment, IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of the Defendant and against the Plaintiff.

BY THE COURT:

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HERBERT J. HUTTON, J.